**IN THE MATTER OF THE APA CONTRACT GRIEVANCE ARBITRATION
BETWEEN THE AUSTIN POLICE ASSOCIATION
AND THE CITY OF AUSTIN**

---

**To the Honorable Arbitrator Lynne Gomez:**

Comes now, the City of Austin ("City") and files this, its Post-Hearing Brief in the above-referenced matter, regarding the following legal issues:

1. Are the grievances arbitrable? If so:

2. Do the changes to contractual language in the 2018 Agreement Between the Austin Police Association ("APA") and the City (hereinafter "Agreement" or "contract") evidence the parties' intent to expand the Office of the Police Oversight's ("OPO") purpose and attendant authority?

3. Does the OPO have contractual authority to conduct preliminary reviews of complaints alleging potential officer misconduct, and to recommend complaints to the Austin Police Department-Internal Affairs Division ("IAD") for investigation?

4. Does the parties' bargaining history in negotiating their current Agreement evidence their intent to allow the OPO to conduct preliminary reviews of complaints and issue recommendations to APD-IAD?

5. Does the Arbitrator have the authority to grant the relief requested in the grievances?

## I. BACKGROUND FACTS

The City and the APA reached an Agreement effective November 15, 2018, as authorized by Chapter 143 of the Texas Local Government Code. *See* Union Exhibit ("UE") 1. The Agreement was the result of negotiations between the parties to replace their previous Agreement entered in 2013, which expired on or about September 30, 2017.[1] *See e.g.,* Hearing Transcript ("Tr.") 528-530. These most recent contract negotiations began in 2017 and continued until the parties entered the current Agreement on November 15, 2018. The current Agreement remains in effect at the time of this filing. *Id* at 3.

---

[1] *See* "2013 Agreement Between the City and APA" (attached). The parties agreed to extend the effect of this 2013 Agreement while they continued negotiating the current Agreement until it expired in December of 2017. *See, e.g., Austin Police Ass'n v. Chief Brian Manley Police Dept.*, No. D-1-GN-18-000923, 2018 WL 3719786 (Tex.Dist. May 9, 2018).

The current Agreement reflects the parties' mutual decision to add numerous contractual provisions pertaining to the new OPO[2], all of which expanded the OPO's purpose and prescribed role. *See* UE 1 at 46-62; *see also* City Exhibit ("CE") 1 and 2. In furtherance of the foregoing, the Agreement specifically augmented the OPO's duty and authority to provide transparency in policing (beyond what existed in the prior agreement). These additions to the OPO's duties and authorities were designed and intended by the parties to build trust between the community and the Austin Police Department. *Id.*

The OPO is a City of Austin office staffed with city employees. The OPO performs a number of functions, which are authorized by the City Manager. Among other things, OPO monitors APD Internal Affairs Division (IAD) proceedings within the overall scope of its activities. *See* UE 1 at 46-62; *see also* City Exhibits ("CE") 1 and 2. All files and documents created or received by the OPO relating to complaints of police officer misconduct and IAD investigations of complaints are maintained by IAD at APD. *Id.*

The APA has become demonstrably disenchanted with several ostensibly unanticipated effects of the increased transparency in policing it bargained for in 2018, and particularly so with respect to OPO's role therein. In its two grievances at issue, the APA alleges multiple contractual violations related to the OPO's oversight of administrative investigations of potential APD Officer misconduct.

**1. APA Contract Grievance re: OPO Investigations #1 (Officer Hewitt)**

In its letter dated July 10, 2020, the APA filed a Contract Grievance ("Hewitt Grievance") alleging that "the Office of Police Oversight fabricated or embellished a complaint received about Officer Hewitt and then investigated said complaint in direct violation of the Agreement." UE 6 at 1. The Hewitt Grievance further alleges that "this is an on-going Agreement violation." *Id.* The APA in

---

[2] The Agreement language reflects the City Manager's Memo of November 2, 2018, which delineates the OPO's new name (previously "OPM"), role, and duties. *See* CE 1 and 2. The Agreement explicitly provides that "[f]or the purposes of this Agreement the term OPO shall mean OPO and the term OPO shall mean OPM." UE 1 at 48.

this Grievance asserts that the City is misinterpreting and misapplying the terms of Article 16 of the parties' Agreement, and requests the following relief:

> Remove any and all information regarding IAD Case 2019-1156 from all of Officer Hewitt's personnel files, including the (g) file, because the original complaint was clearly invalid and the IA investigation was conducted based solely on the OPO's unauthorized investigation and evidence gathering. Furthermore, ensure the OPO and Director Muscadin do not monitor Officer Hewitt's future conduct or behavior if it is not related to a specific complaint received by the OPO.
>
> Moving forward ensure proper enforcement of the complaint intake process from the OPO. Do not accept clearly invalid complaints from the OPO or launch IA investigations into complaints manufactured by the OPO through unauthorized investigation and evidence gathering. The OPO and Director Muscadin must abide by the civilian oversight provisions set forth in the Agreement and if they continue to fail to do this, take action immediately and do not accept or investigate unauthorized forwarded complaints.
>
> In the future, do not allow the OPO or Director Muscadin to be the final decision maker in in complaint classification or act as an independent investigatory unit. The Agreement mandates that only the Chief of Police retains all managements rights and authority over the administrative investigative process and determines the final classification of an allegation.
>
> UE 6 at 6-7.

**2. APA Contract Grievance re: OPO Investigations #2 (OPO Complaint Intake)**

In a letter dated November 3, 2020, the APA filed a second Contract Grievance (hereinafter "Complainant Grievance") specifically alleging that "Mallory Scott, from the OPO, telephoned a citizen complainant to officially record his complaint." UE 4 at 2. The APA in its Complainant Grievance letter asserts that "[i]n said recording, Mallory Scott specifically stated that the an [sic] OPO Complaint Specialist will request BWC, dash camera video, reports and anything they can get with the date, time, and location information [the complainant] shared with them." *Id.* The APA argues that because the Agreement does not "specifically authorize a pre-review of Departmental material prior to the case being sent to IAD for assignment for investigation," APD allowing OPO "unfettered access to Departmental material prior to an official internal affairs investigation" is a direct violation

of the Agreement. *Id* at 3. The APA further alleges that "this is an on-going Agreement violation,"[3] and requests the following relief:

1. Going forward, ensure that the Office of Police Oversight and/or any of its representatives do not have access to BWC, dash camera video, reports and anything relating to a complaint in which they are accepting from the public.

2. Ensure that the Office of Police Oversight and/or any of its representatives are not personally gathering evidence and investigating Officers prior to submitting a complaint to the Internal Affairs Division.

3. Ensure that Office of Police Oversight and/or any of its representatives only have access to BWC, dash camera video, reports and other information regarding an officer's alleged misconduct ONLY once an official administrative investigation has been initiated by the Department and ONLY if this information is actually obtained through the investigation and /or included in the IAD file..

4. Moving forward, ensure that the Office of Police Oversight audio records all contact made with a complainant via the telephone or in person and make sure those recordings are included in the IAD file. This includes interactions where the initial complaint is taken and any follow up contact made. If the complaint is made to the OPO in writing, ensure the original complaint made by the Complainant is included in the IAD file and not just the OPO's summary of the complaint.

UE 4 at 4-5.

## II. ARGUMENT & AUTHORITIES

### 1. <u>Introduction</u>

Subject to and without waiver of the untimeliness and inarbitrability of the Grievances, the City asserts that the changes to the contract language of the relevant provisions of the Agreement and the Parties' bargaining thereon evidences the parties' shared intent to expand the OPO's role and authority to allow OPO to provide transparency in policing. As set forth more fully below, the Parties' bargaining history and current Agreement terms such as Article 16, Section 1(b)(4)—one of many new

[3] *Id.* at 1.

provisions not included in the prior agreement[4]—reflects the compromise reached by the Parties to allow OPO to serve its current explicit purpose: "to provide transparency in policing and thereby fostering trust between the community and the Police Department." UE 1 at 46; Tr.528-30.

As the hearing in this matter revealed, meaningful implementation of the OPO's contractual and City-directed[5] new purpose to provide transparency and foster trust between the community and APD necessarily required the OPO to enhance its level of engagement with APD. This codified mutually-intended expansion of the OPO's purpose and authority in November of 2018[6] predictably mandated OPO to increase its practical input into administrative reviews of police officer conduct. At the hearing, multiple witnesses offered testimony regarding the OPO's increased input, which by all accounts include, *inter alia*, OPO's reviewing of APD-gathered and controlled evidence, conducting preliminary complaint reviews, and issuing complaint recommendations to APD. *See, e.g.,* Tr.510-512.

Notably and unsurprisingly, the foregoing examples of the OPO's enhanced engagement with APD—and specifically its input in APD-IAD administrative reviews of officer conduct—comprise the basis of the primary allegation made by the APA's two grievances at issue, i.e., that OPO's review of APD materials constitute independent "investigations." *See* UE 4, 6; Tr.368. The hearing also revealed, however, that the OPO reviews only evidence that APD-IAD has gathered and placed into the ICMS system for OPO to access. *See* Tr.64, 112-13, 656-57. In other words, OPO does not gather its evidence, but relies entirely on APD IAD for investigation. Moreover, the evidence at the hearing demonstrated that APD ultimately determines not only the classification of individual complaints but also the merits thereof. Accordingly, APD alone decides whether IAD needs to investigate a complaint against an officer, just as APD alone decides whether discipline should be imposed upon an officer.[7]

---

[4] *See* 2013 Agreement Between the City and APA, Article 16(1)(b).
[5] *See* City Exhibits 1 and 2.
[6] *See, e.g.,* Tr.306.
[7] *See, e.g.,* Tr.120-21, 510-12, 565-67, 581-82, 625-26, 659-61.

While the Parties agreed in 2018 during bargaining of the Agreement that oversight of and transparency in policing are critical priorities—and negotiated the terms of the requisite OPO expansion—the APA has become disenchanted with the OPO's increased involvement. *See* Tr.306. Unsurprisingly, the APA in its Grievances promotes its own interpretation of the Agreement terms pertaining to the OPO and expresses its disagreement with the City's interpretation thereof. *See* UE 4, 6.

The City posits that the APA in its Grievances not only misinterprets the meaning of the Agreement terms it selectively references therein, but also bases its allegations of Article 16 violations solely upon its own unfounded conclusions. Specifically, the APA alleges that an OPO staff member reviewing the bodyworn camera (BWC) footage of an officer named in a complaint constitutes an "investigation" and "gathering evidence" and therefore a violation of Article 16. *See* UE 6 at 4. However, as the hearing record evidence shows, the OPO is inherently required to conduct a preliminary review of complaints received. *See* Tr.68-70, 77-78, 86-87, 94-95, 306, 652-53; *see also* CE 1, 2; CE 3 at 22-23. This is particularly necessary for external complaints received from community members, which are frequently submitted anonymously. *Id.*; UE 1 at 47.

The APA similarly alleges that an OPO representative asking a complainant questions about the complained-of interaction and informing them that OPO would review available materials pertinent thereto is in "direct violation of the tenants [sic] of the Meet & Confer Agreement." UE 4 at 2-3. The APA's allegation disregards Article 16, Section 3(b)(2) of the Agreement. This section states that the "OPO may obtain the following information in connection with the filing of a complaint of officer misconduct: a) the complainant's personal information; b) the nature of the complaint; c) witness information; d) the incident location, date, and time; and e) the APD Officer(s) involved." UE 1 at 48-49. As the hearing testimony illustrated, the process by which the OPO obtains the above-listed information from a complainant often requires—naturally and intrinsically—

conversing with a complainant and asking them questions about their complaint. In short, it is entirely reasonable—and within the bounds of what the Agreement permits—for OPO staff to review BWC footage and to ask the complainant a few questions when determining "the nature of the complaint," information about witnesses, and other basic pertinent information.

The City asserts that the APA's Grievances are further undermined by Article 16, Section 2(d). A new addition to the Agreement not found in its 2013 predecessor, Section 2(d) explicitly authorizes the OPO to "act as complainant in any allegation on its own initiative" and delineates that if "the OPO acts as the complainant, the Director of OPO shall document the source of the complaint."[8]

Through its grievances, the APA asks the arbitrator to interpret Article 16 in a manner that it is both inconsistent with its text and that is internally inconsistent. The APA argues that OPO is prohibited from engaging in any task—including potentially unanticipated, yet necessary aspects of its prescribed duties, e.g., to receive complaints or conduct comprehensive reviews of IAD investigations—that is not explicitly authorized by the Agreement. The APA's desired interpretation of Article 16 is inconsistent with both its actual meaning and evidenced intent, and such an extreme interpretation is neither compelled by the Agreement nor applicable law; it also fails to comport with common sense. When the Parties drafted Article 16 to give the OPO specific duties and functions, they must necessarily have intended to give OPO the authority to do the basic work to carry out those functions.

The APA offers no substantive evidence to support its contention that either party to the Agreement intended to constrain the authority of the OPO such that it would potentially be incapable of serving its purpose. Rather, the only evidence on the record supports the opposite conclusion, as the parties' 2018 contract negotiations resulted in the current Agreement, which only expanded the

[8] UE 1 at 47.

OPO's purpose and attendant authority. Moreover, the APA dropped its lawsuit against the City[9]—that involved the same complaints as its Grievances at issue contain—directly upon reaching the Agreement and entering it on November 15, 2018. *See* Tr.314-319, 629-631.

Finally, the arbitrator does not have authority to modify or create additional provisions to the Agreement. *See* UE 1 at 83. Pursuant to Article 20, Section 4, the arbitrator's authority is "strictly limited to interpreting and applying the explicit provisions" of the Agreement. *Id.* The City likewise asserts that the items of relief requested by the Grievances are not necessary to interpret or apply Article 16, nor is such relief within the arbitrator's authority to grant. *Id.*

Based on the evidence adduced and applicable law, the City asserts that the APA failed to sustain its burden of proving that the City is in "direct" and "clear" violation of the Agreement or LGC Section 143.312. The City submits that the record evidence shows the parties' mutual intention to augment transparency in policing by expanding the OPO's role in negotiating the current 2018 Agreement. While the APA may not have anticipated every aspect of this agreed expansion of OPO's role that it now finds inconvenient or unpalatable, the City asserts that the Grievances and the record evidence shows that the OPO has effectively grown into its contractually expanded purpose. If anything has been demonstrated during this arbitration it is that OPO is providing the transparency in policing and building the trust between the community and APD that the parties intended and memorialized in the Agreement. Accordingly, the Grievances must be denied.

**a. APA's grievances are untimely and inarbitrable.**

The Agreement expressly addresses grievance timeliness in Article 20, Section 3, which provides that "[i]f any timeline or deadline for a decision is missed by the City, the grievance automatically proceeds to the next step in the process. If any timeline or deadline for a decision is missed by the Association, the *grievance is considered to be resolved and dismissed*." UE 1 at 82 (emphasis

[9] *Manley v. Austin Police Ass'n*, No. 03-18-00326-CV, 2018 WL 6425019 (Tex. App. Dec. 7, 2018).

added). The City therefore asserts that the APA bears the burden of adhering to the Agreement's prescribed grievance filing deadlines.

Here, while the City concurs with the APA that the Chief of Police did not issue Step 2 grievance responses in either of the two Grievances at issue within the 15-day period delineated by Article 20, the City concomitantly asserts that the Chief missing the Step 2 response deadlines automatically advanced both grievances to Step 3, as prescribed by the above-quoted Article 20. Because the APA subsequently failed in both Grievances to adhere to its contractually mandated Step 3 deadlines to timely proceed, both Grievances at issue must be determined "dismissed" pursuant to the terms of Article 20, Section 3.

The APA has also been aware of the OPO reviewing APD materials related to complaints of officer conduct—which the APA characterizes in its Grievances as "the OPO conducting independent investigations"—since at least May 9, 2018, when it filed a lawsuit in state district court alleging the City committed statutory violations based on the same OPM activities referenced above.[10] *See* Tr.314-319, 629-631. Thus, while the APA argues that the foregoing OPO tasks constitute "continuing violations," the APA does not explain why it waited until July of 2020 to first grieve the alleged violations on behalf of one individual officer (Hewitt). Nor does the APA offer evidence that it has ever attempted to utilize the "Dispute Resolution" provision delineated in Article 16, Sec. 7(a), which provides the following:

> Complaints concerning the conduct of OPO employees shall be filed with the Director of the OPO, or if the complaint concerns the personal conduct of the Director, shall be filed with the City Manager. If not resolved at the first level, a fact finder shall be appointed to review relevant materials and take evidence to reach written findings of fact, which shall be expedited for final resolution within two weeks after appointment…
>
> UE 1 at 58.

---

[10] *See, e.g., Austin Police Ass'n v. Chief Brian Manley Police Dept.*, No. D-1-GN-18-000923, 2018 WL 3719786 (Tex.Dist. May 9, 2018).

Rather, the APA gave testimonial evidence at the hearing that "[i]t would probably be very frowned upon" for the APA to submit complaints concerning the conduct of OPO employees or OPO Director Muscadin directly to the OPO. Tr.334-35. The City submits that the APA's presumption that its utilization of the Agreement's dispute resolution process would "probably be very frowned upon" is not a legitimate basis for declining to do so. The City further submits that its clear preference for filing contract grievances on its complaints involving the OPO and/or OPO Director Muscadin—rather than utilizing the Agreement's delineated process—constitutes forum shopping, and a failure to exhaust available remedies.

Accordingly, for the reasons stated above, both Grievances are inarbitrable as improperly prosecuted and untimely.

**2. <u>Changes to Agreement Terms Evidence Parties' Intent to Expand OPO's Role</u>**

The current Agreement negotiated and entered by the parties added several pertinent provisions to Article 16 that the preceding Agreement did not contain. First, the parties added the following to Article 16, Section 2 ("Definitions"):

> a) "Anonymous Complaint" means any complaint under subsection (b) herein which the Complainant does not identify him or herself or does not wish to be identified. There shall be no duty to determine or reveal the identity of a Complainant.
>
> b) "Complaint" means either (1) an affidavit or (2) any other written or verbal communication setting forth allegations or facts that may form the basis of future allegations of misconduct against an officer and which serves as the basis for initiating an investigation. The Parties specifically agree that anonymous written or verbal communications meet this definition of "Complaint."
>
> c) "Complainant" means a person, including an Officer, claiming to be a witness to or the victim of misconduct by an Officer. "Complainant" does not include the Department designee in the case of an administrative referral, except that the OPO may act as complainant in any allegation on its own initiative, and in the case of an anonymous complaint, the OPO or whichever entity that receives an anonymous complaint may act as Complainant. If the OPO acts as the complainant, the Director of OPO shall document the source of the complaint.
>
> UE 1 at 47.

Additionally, the current Agreement includes the new Article 16, Section 3(b)(3), which provides as follows:

> (3) If the intake is in person, the OPO shall digitally audio record the taking of the information provided in Section 3(b)(2). The OPO will promptly forward the completed complaint and audio recording to IAD when requested by IAD. A complainant may be subsequently interviewed by the IAD investigator for purposes of clarification or to obtain additional information relevant to the investigation. The OPO may attend any such subsequent interviews.
>
> For external complaints, the OPO may make a recommendation for classification of the complaint to IA. The nature of the complaint and OPO's recommended classification may be made public, but shall not include the name of the complainant or officer, witness information, or the incident location, date, and time.
>
> UE 1 at 49.

The current Agreement added Article 16, Section 6(a)(8):

> For external non-critical incident cases in which discipline is imposed at the level of an oral reprimand or greater, OPO recommendations may be made public along with the corresponding oral reprimand (or greater).
>
> UE 1 at 56.

The Agreement also added Article 16, Section 8(d)(4):

> d) A breach of the confidentiality provisions of this AGREEMENT and/or Chapter 143 of the Texas Local Government Code by any individual involved in Civilian Oversight:
> (1) Shall be a basis for removal from office;
> (2) May subject the individual to criminal prosecution for offenses including, but not limited to Abuse of Official Capacity, Official Oppression, Misuse of Official Information, or the Texas Public Information Act; and/or
> (3) May subject the individual to civil liability under applicable State and Federal law.
> **(4) A credible allegation as determined by the City Manager shall result in an investigation.**
>
> UE 1 at 59-60.

As shown above, the current Agreement's provisions pertaining to the OPO's purpose, role, responsibilities, and authority are substantively different from the prior Agreement. Texas courts interpret contracts such as the parties' Meet & Confer Agreement "as a whole" and "in accordance

with the plain meaning of its terms." *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892 (Tex. 2017). The courts' primary concern is to ascertain the parties' true intent as expressed by the plain language in the agreement, and to ensure that no provision is rendered meaningless. *Id.* at 892–93. Courts assign terms their ordinary and generally accepted meanings unless the contract directs otherwise. *Id.* at 893. "If the language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law." *Id.* A contract is not ambiguous merely because the parties offer conflicting interpretations, but only when the contract is actually susceptible to two or more reasonable interpretations. *Id.* "'The fact that the parties may disagree about the [agreement's] meaning does not create an ambiguity.'" *Id.* (quoting *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010)).

In the instant case, the parties' prior Agreement did not include any of the above-listed language, all of which expands OPO's role, authority, and level of involvement with APD. At hearing, OPO Director Farah Muscadin testified at length about how (and why) the 2018 Agreement intentionally expanded the OPO's purpose and authority, and regarding what this intentional expansion of OPO meant in practice. *See generally* Tr.49-167, 190-222; *see also* CE's 1-3. APA Vice President Thomas Villareal, who was an integral member of the APA bargaining team during contract negotiations, testified that he understood the changes to the parties' Agreement over the years has expanded the OPO's role. Tr.306. APA-VP Villareal also specifically testified that he "agreed with OPO Director Muscadin" that the "OPO has expanded." *Id.*

Thus, the changes to the relevant contract language constitutes evidence of the parties' intent to allow the OPO to provide transparency in policing, which the record evidence demonstrably shows to include reviewing confidential materials and conducting preliminary reviews.

### 3. <u>OPO Accessing Confidential Materials is Not a "Release" Under the Statute</u>

The Attorney General has held that "[M]embers of the governing body of a state or local governmental entity have an inherent right to examine the records of the governmental entity'." *AG Opinion,* JC-0283, 2000 WL 1279863 *3. "In neither case does release to the governing body of the municipality constitute a release to the public." *Id.*

The OPO Director is an appointee of the City Manager, in his chain of command and acts as his designee in matters within his authority under the City Charter.[11] *See* CE 1, 2; UE 46-62. The OPO Director does not act as a member of the general public. She performs her duties within the confidentiality provisions of the Agreement, Chapter 143, Chapter 552, HIPPA, ADA, and all other laws and City personnel policies applicable to confidentiality of personnel matters. UE 1 at 46-62. The confidentiality provisions of Chapter 143 (i.e., Tex. Loc. Gov't Code § 143.089(g)) are only triggered by a request from a person outside of the City invoking the PIA to obtain public records, or making a request for records via subpoena. There are no PIA records requests or subpoenas in the Grievances at issue. A PIA request or subpoena from a member of the general public or a person outside of the City for records protected by Section 143.089(g) would be denied as seeking confidential information, and the information would be withheld. Under the PIA, the City would seek an AG opinion to uphold that denial, and has repeatedly done so in hundreds of requests, as recently as a few months ago.[12]

Additionally, APD-IAD staff, as well as legal staff, access materials confidential under §143.089(g) as necessary for administration of duties of their offices without running afoul of confidentiality provisions in the Agreement or Chapters 143 or 552 because internal use by the municipality is not a "release of information," it is an administrative necessity. UE 1 at 52-55; *TLGC,*

---

[11] City voters approved a proposition in May of this year ("Prop C") to place the OPO under City Council's authority rather than the City Manager, however this change has not yet been implemented at the time of this brief's filing.

[12] The APA's request under the PIA related to the hearing in this matter was not such a request, as the APA and its legal counsel are not members of the general public. *See Tr.*18-24.

§143.089(g). The City Manager has direct-line responsibility for all aspects of City operations under the Charter, the City Council governs and the City Manager reports to and is responsible to the Council. *Charter,* Arts. I &V.

Ultimately, the APA claim based on OPO *potentially* releasing confidential information to the general public fails because it has not occurred and it is wholly speculative, particularly when employees are subject to civil and criminal penalties, as well as discipline up to termination under both the Agreement and City personnel policies for violating confidentiality. UE 1 at 57-58.

**a. OPO's preliminary review of APD materials related to complaints received is not an "investigation."**

The APA alleges that because the Agreement does not "specifically authorize a pre-review of Departmental material prior to the case being sent to IAD for assignment for investigation," APD allowing OPO "unfettered access to Departmental material prior to an official internal affairs investigation" is a "direct violation of the Agreement." UE 4 at 3. The City submits that the APA's interpretation of the meaning of Article 16's pertinent terms is fatally flawed.

The OPO acts as the City Manager's eyes and ears in the oversight process monitoring Internal Affairs Division proceedings at the Austin Police Department on his behalf. The Civil Service Act expressly allows a city employee to "conduct" an investigation without running afoul of §143.089(g) or §552.102. *See Tex.Atty.Gen.Op.,* GA-0044, 2003 WL 1559503 *1. It follows that a city employee may provide oversight and input in an investigation—including but not limited to reviewing confidential APD gathered materials and issuing recommendations to IAD for complaint classifications—without running afoul of those confidentiality provisions.

The APA asserts that the OPO is independently investigating APD officers. *See* UE 4, 6. In support of its allegation, the APA offered an email from OPO Director Muscadin to APD Commander Staniszewski, Officer Hewitt's Commander, regarding the APD-IAD's investigation of Officer Hewitt's conduct (IA Case 2019-1156) arising from the initial complaint OPO received about

his conduct. UE 9; *see also* UE 7, 8. While the APA presents this message from Director Muscadin to the APD Commander as dispositive of OPO independently investigating and threatening[13] officers, the Agreement explicitly authorizes her to make such inquiries.

Article 16, Sec. 3(a) of the Agreement provides that "[t]he Director of the OPO may inquire of the Commander of the Internal Affairs Division or the Chief of Police, or the Chief's designee, as to the status of any pending IAD investigation." UE 1 at 48. Moreover, Article 16, Sec. 12(a) states that "[t]he CITY expressly retains its right and ability to proceed with the determination of whether or not police misconduct occurred and the authority of the Chief to impose disciplinary action. The ASSOCIATION recognizes the fact that such reservations are essential to this AGREEMENT." *Id* at 61. The OPO is explicitly authorized under the Agreement to "make a recommendation" to APD regarding classification of external complaints alleging officer misconduct such as the one it received against Officer Hewitt. *Id* at 49. OPO Director Muscadin's recommendation to Commander Staniszewski that Officer Hewitt receive counseling or additional training was also appropriate pursuant to APD policy, as specified in the "Chain-of-Command" segment of IAD's Notice of Allegations Memorandum that it issued Hewitt. UE 8. Thus, OPO Director Muscadin, in making this recommendation to Commander Staniszewski, was operating not only within the scope of her authority, but within the lines of her specifically prescribed duties as delineated by Article 16, Sec. 3.

**b. The City Manager derives his authority over the City from the Charter.**

Austin is a home-rule municipality and the City Manager's grant of authority is derived from the Charter adopted by the City Council. A "home-rule city, unlike other types of municipality, by virtue of the home-rule amendment to the Texas Constitution, article XI, section 5, has broad authority to exercise all powers not prohibited by statute . . . A home-rule municipality need not look to the legislature for grants of power but only for limitations on its powers. *Proctor v. Andrews,* 972

[13] *See* Tr.44-45, 602-03.

S.W.2d 729, 733 (Tex. 1998)." *Tex.Atty.Gen.Op.,* GA-0044, 2003 WL 1559503 *1. The City Manager—presently Spencer Cronk, whom the Council hired in December of 2017—has responsibility for directing the operations of all City departments, including APD. *Charter,* Art. V, Sec. 3. There is no City Council delegation issue here because the Charter gives that authority directly to the City Manager. Thus, there is no need for formal Council action each time he acts within his express authority.

First, "[i]nformation made confidential by subsection 143.089(g) of the Texas Local Government Code may be released to the city manager and the city attorney." *Tex.Atty.Gen.Op.,* JC-0283, 2000 WL 1279863 *4. In recognizing the inherent right to delegate authority, the Attorney General did not limit the right to examine (g) file records to these two executives *only*, instead expressly recognizing that "they may designate those individuals, *including* the city manager and the city attorney, who shall have access to the file." *Id.,* at *4 (emphasis added). Again, the OPO acts as the City Manager's eyes and ears in the oversight process. *See, e.g.,* Tr.49-167, 190-222, 522-82.

Simply stated, the City Manager is well within his authority under both the Agreement and germane state law to designate duties to other individuals in the chain of command, including review of confidential materials. The AG has opined that information made confidential by subsection 143.089(g) "may be released to the city manager and the city attorney." *AG Opinion,* JC-0283, 2000 WL 1279863 *4. "[T]he chief executive and the members of the governing body, and any other individual in the chain of command between the fire and police chief and the chief executive, are not persons 'outside the department.' They are the supervisors of the department." *Id.* "In our opinion, therefore, subsection (g) should not be read to include the municipality's chief executive and members of its governing body within the ambit of those 'persons or agencies' from whom the subsection (g) file must be withheld. This construction is consistent with well-established doctrine." *Id.*

It is undisputed that the City Manager has ultimate authority over APD and its employees, including police officers, pursuant to the Austin City Charter, his *enabling* authority. *Hall v. McRaven*,

508 S.W.3d 232, 242 (Tex. 2017); Tr.214-15. Within that authority, the City Manager interprets Chapter 143, "a law *collateral* to [his] authority." *Id.* "In order to act without legal authority in carrying out a duty to interpret and apply the law, [City Manager] must have exercised discretion 'without reference to or in conflict with the constraints of the law authorizing [him] to act." *Id.*

**c. The City Manager derives his authority over APD from Chapter 143.**

The City Manager's authority over APD is not only established in the Agreement and City Charter but also in the Civil Service Act, which the APA alleges violation of. *See* UE 4 at 3; Tr.317-19. The statute authorizes appointment of the Chief of Police by the City Manager. *TLGC,* §143.013(a)(1). The statute also authorizes "Investigation" by a non-sworn employee. *TLGC,* §143.312(b)(2)-(3). A home-rule municipality need not look to the legislature for grants of power but only for limitations on its powers. The intent of the legislature to impose such a limitation must appear with unmistakable clarity.

Here, much to the chagrin of the APA, there is no limitation on the City Manager's authority to delegate a city employee to oversee investigations into police officer misconduct, civilian or otherwise. The rules of statutory construction do not allow the absurd result that the CEO of a city with 14,000+ employees personally oversee every IAD proceeding and review every external complaint received, which cannot await his availability because there are contractual and statutory deadlines for imposing discipline. *TLGC,* §143.052. By and through its grievances, the APA is attempting to indirectly impose such a requirement, which would effectively extinguish the City Manager's ability to control and oversee APD's complaint and disciplinary process. This result is neither compelled by the applicable laws,[14] nor does it comport with common sense.

[14] The plain language of §143.312 expressly authorizes a city employee to conduct "investigations," contrary to the APA Grievances' claim that allowing civilian employees of the OPO to participate in the Austin Police Department's departmental disciplinary investigation processes violates §143.089.

Section 143.089 authorizes two types of personnel files. First, §143.089(a)-(f) *mandates* a personnel file to be maintained by the Civil Service Commission. The file is mandatory, and subject to disclosure to the public. The police officer approval language in (f), and the access language in (e) demonstrates that the legislature intended officers to have some privacy interest in their civil service file. §143.089(g) *allows* a personnel file to be maintained by the department. The file is discretionary, and not subject to disclosure to any third party, including prosecutors. The (g) file does not give officers any interest in the departmental personnel file, it is created by the department for its own use.

Because the APA's grievances' reference only *potential* release of confidential personnel file materials and there has been no request from a requestor for (g) file records, Chapter 552 is not implicated. Even if there were, the OPO does not maintain any APD files. *See* UE 1 at 42-62; Tr.213-215. IAD maintains all files and "the department may not release any information contained in the department file to any agency or person requesting information." *TLGC,* §143.089(g). Thus, the City has preserved the legislature's intent of "ensuring that innocent officers would not have their reputation smeared." *See Abbott v. City of Corpus Christi,* 109 S.W.3d 113, 120 (Tex.App.—Austin 2003).

Further, the Agreement explicitly allows the release of confidential information pertaining to APD and APD officers in certain situations. Specifically, Article 16, Sec. 6(a)(9) of the Agreement provides that "[i]t is expressly understood and agreed by the parties that any recommendation and/or report released pursuant to this Section may contain information which would otherwise be made confidential by Section 143.089(g) of the Texas Local Government Code." UE 1 at 57.

**4. <u>The APA's Requested Relief is Not Authorized Under the Agreement</u>**

The City has established above that the City has not violated the terms of the Agreement, and the Grievances are without merit. Further, the City asserts that, even assuming *arguendo* that there is any merit to the Grievances, the relief requested by the APA exceeds the authority granted to the arbitrator under Article 20 of the Agreement.

In its Hewitt grievance, the APA seeks to "ensure going forward" the following relief:

(1) "the Office of Police Oversight and/or any of its representatives do not have access to BWC, dash camera video, reports and anything relating to a complaint in which they are accepting from the public,"

(2) "that the Office of Police Oversight and/or any of its representatives are not personally gathering evidence and investigating Officers prior to submitting a complaint to the Internal Affairs Division";

(3) "that Office of Police Oversight and/or any of its representatives only have access to BWC, dash camera video, reports and other information regarding an officer's alleged misconduct ONLY once an official administrative investigation has been initiated by the Department and ONLY if this information is actually obtained through the investigation and /or included in the IAD file..";

(4) "that the Office of Police Oversight audio records all contact made with a complainant via the telephone or in person and make sure those recordings are included in the IAD file. This includes interactions where the initial complaint is taken and any follow up contact made. If the complaint is made to the OPO in writing, ensure the original complaint made by the Complainant is included in the IAD file and not just the OPO's summary of the complaint."

UE 4 at 4-5.

In its Complainant Grievance, the APA seeks the following relief:

(5) "Remove any and all information regarding IAD Case 2019-1156 from all of Officer Hewitt's personnel files, including the (g) file, because the original complaint was clearly invalid and the IA investigation was conducted based solely on the OPO's unauthorized investigation and evidence gathering. Furthermore, ensure the OPO and Director Muscadin do not monitor Officer Hewitt's future conduct or behavior if it is not related to a specific complaint received by the OPO;"

(6) "Moving forward ensure proper enforcement of the complaint intake process from the OPO. Do not accept clearly invalid complaints from the OPO or launch IA investigations into complaints manufactured by the OPO through unauthorized investigation and evidence gathering. The OPO and Director Muscadin must abide by the civilian oversight provisions set forth in the Agreement and if they continue to fail to do this, take action immediately and do not accept or investigate unauthorized forwarded complaints;"

(7) "In the future, do not allow the OPO or Director Muscadin to be the final decision maker in in complaint classification or act as an independent investigatory unit. The Agreement mandates that only the Chief of Police retains all managements rights and authority over the administrative investigative process and determines the final classification of an allegation."

UE 6 at 6-7.

The above-listed requested relief is, in its totality, unnecessary and contrary to the terms of the Agreement (and applicable law). Specifically, requested item of relief #1 is not specifically addressed in the Agreement, and thus—pursuant to the Agreement's express language addressing conflict (and alternatively, lack thereof) between its terms and the statute—the OPO has the authority under the statute to review such materials. *See* UE 1 at 63, 90. Requested relief item #2 is improper as it presumes a contractual violation. Item #3 is improper because the record evidence proves that this is how OPO receives such materials, i.e., from IAD. Requested item #4 is likewise improperly requested because the Agreement already addresses recording of Complainant intake conversations in Article 16, Section 3, and moreover the requested relief would be contradictory to this Agreement term.

The APA's requested relief item #5 erroneously presumes a determination of what documentation/materials are "invalid." Moreover, the arbitration in this matter involved contract grievances, not a name-clearing hearing. Requested item of relief #6 likewise cannot be granted, as it does not specify what constitutes a "clearly invalid complaint", nor did the hearing in this matter shed much light on that particular question. Item #7 is improper because the record evidence demonstrates that OPO Director Muscadin has not and does not act as an independent investigator, nor does the OPO act as an "independent investigatory unit." Tr.213-215. Director Muscadin has the right to provide input to APD-IAD on complaint classifications pursuant to the express terms of Article 16, and she testified at hearing that she recognizes the Chief of Police retains all management rights, etc., over the APD administrative investigation process. *Id.*

In sum, all the above-listed items of relief the APA requested in its Step 2 grievances would require the arbitrator to "modify" and/or contradict the Agreement, or to "create additional provisions" not included in the Agreement in violation of Article 20.

Lastly, no APA member has suffered injury from the invasion of a legally protected interest. Contrary to the APA's speculative and conclusory allegation, the OPO monitoring IAD proceedings

on behalf of the City Manager does not violate §143.089(g) or §552.102. The APA does not and cannot allege that there has been a request for records which resulted in a release of confidential personnel files to the general public, because—as the dearth of any evidence substantiating this claim suggests—there has been no such release. The APA offers no legitimate basis for its ostensible concern that the OPO will violate laws and policies by releasing confidential information to the public in the future, and the fact that the OPO has not done so previously only highlights the speculative nature of the APA's allegations.

## VI. CONCLUSION

The APA has the burden of proof in this contract grievance, and it has not and cannot provide any substantive evidence to sustain its burden. As established in the hearing and delineated above, the changes to the pertinent terms of the Agreement and the parties' bargaining history both evidence the parties' shared intent to expand the OPO's purpose to provide for transparency in policing and to build trust between the community and APD. The relevant Agreement terms do not prohibit the OPO from conducting preliminary reviews of complaints, obtaining information from complainants, or reviewing materials it receives from APD. Moreover, applicable statutes and germane case law provide that municipal police oversight entities such as the OPO are authorized to perform duties required to serve their purpose.

Thus, for the reasons stated herein, the City requests that the Honorable Arbitrator dismiss the APA's Grievances, and order the APA to pay the entire Arbitrator's fee as provided for in Article 20, Section 4, Step 4, of the Agreement, which provides that "[t]he fees of the arbitrator shall be borne by the losing party."

Respectfully submitted,

*/s/ Ben Phillips* ______________ 10/27/2021 ______________

Ben Phillips, Assistant City Attorney
City of Austin Law Department
301 W. 2nd Street, P.O. Box 1088
Austin, Texas 78701
Phone: 512-974-2470
Fax: 512-974-2312

Date